*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Avocent Corporation	)	Case No.: EXC-16-0008
	)	
Filing Date: February 9, 2016	)	
_____	)	

Issued: July 5, 2016

Decision and Order

This Decision and Order considers an Application for Exception from DOE Energy Conservation Standards for External Power Supplies filed by Avocent Corporation. (Avocent), seeking exception relief from the applicable provisions of 10 C.F.R. Part 430, Energy Conservation Program: Energy Conservation Standards for External Power Supplies (EPS) (EPS Final Rule). In its request, Avocent asserts that it will suffer serious hardship, gross inequity, and an unfair distribution of burdens if it is required to comply with the EPS Final Rule, set forth at 10 C.F.R. § 430.32(w), by February 10, 2016. As stated in this Decision and Order, we have concluded that Avocent's Application for Exemption should be denied.

I. Background

A. Efficiency Standards for External Power Supplies

Title III, Part B[1] of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291 *et seq*.) (EPCA or the Act) established the Energy Conservation Program for Consumer Products Other Than Automobiles, designed to improve energy efficiency of covered major household appliances.

DOE must review energy conservation standards for commercial and industrial equipment and amend the standards as needed no later than six years from the issuance of a final rule establishing or amending a standard for a covered product. 42 U.S.C. § 6295(m). New and amended standards must achieve the maximum improvement in energy efficiency that is technologically feasible and

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

economically justified. 42 U.S.C. § 6395(o)(2)(A). In December 2006, the DOE published a final rule prescribing test procedures for EPSs. *See* 71 Fed. Reg. 71340 (Dec. 8, 2006). On July 1, 2008, section 301 of the Energy Independence and Security Act (EISA) of 2007 established the minimum energy conservation standards for Class A EPSs and supplemented the EPS definition. In June 2009, DOE initiated the current rulemaking effort for EPSs by issuing the Energy Conservation Standards Rulemaking Framework Document for Battery Chargers and External Power Supplies. After receiving comments from the public and additional information, on September 2010, DOE announced a public meeting that took place in October 2010, and made available on its website a preliminary technical support document. In March 2012, DOE published a notice of proposed rulemaking (NOPR) that proposed potential standards for battery chargers and external power supplies and, in May 2012, DOE held a public meeting to solicit relevant comments and information concerning the proposed rule. Many parties submitted comments regarding the duration of the period to come into compliance with respect to their EPS products that ranged from 18 months to at least five years. As EISA directed the DOE to publish a final rule in July 2011, two years before the standards would apply to products in July 2013, the DOE developed a two-year interval from the time of publishing the rule to the time of compliance.

On February 10, 2014, the DOE promulgated a final rule, which set forth the new Energy Conservation Standards for External Power Supplies to take effect on April 11, 2014, with compliance required for EPSs manufactured on or after February 10, 2016 (the February 10, 2016, Standards). 79 Fed. Reg. 7846 (Feb. 10, 2014); 10 C.F.R. § 430.32(w).

B. Application for Exception

Avocent is an American Company headquartered in Huntsville, Alabama.[2] Avocent's Response to OHA's Request for Information (Response) at 1. Avocent manufactures and distributes high-end electronic devices used for data center, control room, remote management, desktop computer access and other commercial IT management applications. Application at 2; Response at 1. Many of Avocent's products utilize EPSs. Avocent does not manufacture the EPSs used for these devices, but hires XXXX, third-party vendors who specifically manufacture EPSs to Avocent's specifications, in order to ensure compatibility for use with its products.[3] Application at 4. Avocent reports that the seven EPS's at issue in the present case are supplied by two third party vendors: XXXXX and XXXXXXXXX. Application at 27. Avocent also sells replacement EPSs to owners of its products. Application at 22. Avocent states that the seven EPSs at issue in the present case have been specifically modified by its suppliers for use with the associated Avocent end-use products, and have undergone extensive testing and certification in order to meet specialized requirements for the products they power. Application at 4, 22, 25. According to Avocent, it must materially redesign each of these seven EPSs in order to comply with the February 10, 2016, Standards. Avocent asserts that redesigning these seven EPSs will require several

[2] Avocent is a business unit of Emerson Network Power, a provider of critical infrastructure technologies and life cycle services for information and communications technology systems. Application at 3-4.

[3] Avocent maintains that it does not market or supply products for consumer use, and Avocent maintains that its products are engineered and tested to commercial standards that generally exceed those for consumer products, in order to ensure the enhanced reliability necessary to meet its customers' needs. Application at 4.

rounds of iterative testing and design adjustments to ensure that they function properly and meet the EPS Final Rule. Application at 5.

Avocent contends that it is unable to redesign the seven EPSs XXXXXXXX at issue in the present case to comply with the EPS Final Rule until August 2016. Application at 6. Avocent therefore contends that requiring it to comply with the EPS Final Rule starting February 10, 2016, will cause it "serious hardship, gross inequity or unfair distribution of burdens." Application at 28 (citing 10 C.F.R. § 1003.20(a)). Avocent requests exception relief in the form of an extension of its mandatory compliance date from February 10, 2016, to August 10, 2016, in order to allow it an additional six months to bring these seven products into compliance with the EPS Final Rule by redesigning them, which it claims is the "minimum relief necessary to alleviate the 'serious hardship, gross inequity [and] unfair burdens'" that Avocent will suffer in the absence of relief. Application at 31-32. Specifically, Avocent claims that if its requested relief is not granted, it will incur "substantial costs not only in terms of its expedited compliance efforts, but also in the form of significant sales lost due to insufficient supplies of EPSs needed for the associated end-use products." Application at 27. Avocent further claims that the energy savings from compliance with the EPS Final Rule are minimal at best. Application at 27, 31.

Avocent claims that it has "diligently endeavored to bring its EPSs into compliance" since mid-2014, when it claims it began contacting its suppliers concerning compliance with the EPS Final Rule. Application at 27. It contends, however, that in December 2014, XXXXXXX, its supplier for XXXX, informed Avocent that compliance would be extremely difficult to achieve for the EPSs it supplies because: (1) new XXXXXXXXX would be required, requiring full re-design of the EPSs, and (2) it has "growing uncertainty about applicability of the EPS Final Rule to commercial use EPSs like those supplied to Avocent." Application at 28. Avocent claims that, in October 2015, XXXXXXXX notified Avocent that it had redesigned these three EPSs, but had not yet obtained "additional country certifications that are commercially necessary [] to serve [its] global market." Application at 28. Avocent contends that it received samples of the three XXXX EPSs in December 2015. Application at 28. At that time, XXXXXX informed Avocent that the design changes to the three XXXXXX EPSs may have negatively affected their ability to comply with Federal Communications Commission (FCC) mandates, therefore requiring "full FCC EMI testing." Application at 28. Avocent further reported that the FCC EMI testing was completed in January 2016, and that XXXXXXX was "preparing for production activities for these EPSs." Application at 28.

Avocent asserts that it contacted XXXXXXXXX, its supplier for XXXXXXXXX, in June 2015, to plan for the production of EPSs that would comply with the EPS Final Rule. Avocent asserts: "At that time, XXXXXXXXX indicated that engineering work was planned to start in July 2015, with samples to be provided to Avocent for testing in September 2015 and certification of compliance expected to be complete in October 2016." Application at 29. However, XXXXXXXXX allegedly informed Avocent, in August 2015, that it had encountered "challenges with the XXXXXXX that necessitated further redesign," which required it to delay the redesign's completion, and the production and delivery of prototype samples to Avocent from September to late October 2015. Application at 29. XXXXXXXXX subsequently estimated that the redesign and testing would be completed by the end of January 2016. Application at 29. Avocent contends

that it did not receive samples from XXXXXXXXX for testing until late January 2016, and that it has not been able to "set the schedules for FCC testing." Application at 29.

Avocent claims that once an EPS is redesigned, and testing completed, there is still a 13 to 16 week lead time before the products can be delivered to Avocent, " XXXXXXX." Application at 30.

In order to obtain evidentiary support for Avocent's assertions that it was unable to obtain EPSs which complied with the EPS Final Rule, we asked Avocent to "submit copies of any correspondence between Avocent and potential or actual suppliers of EPS concerning Avocent's attempts to procure or obtain EPSs which meet the [EPS Final Rule] standards for the seven products for which it seeks exception relief." March 11, 2016, Request for Information (RFI) at 1. On March 25, 2016, Avocent responded to the RFI, stating in pertinent part: "Due to confidentiality concerns, Avocent is not at liberty to provide materials from its suppliers. Avocent's compliance efforts are described in its Application and in the Responses above." Avocent's Response to the RFI at 15.

II. Analysis

A. Exception Relief

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194(a), authorizes the Secretary of Energy to make "such adjustments to any rule, regulation, or order" issued under the EPCA, consistent with the other purposes of the Act, as "may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The Secretary has delegated this authority to DOE's Office of Hearings and Appeals (OHA), which administers exception relief pursuant to procedural regulations codified at 10 C.F.R. Part 1003, Subpart B. Under these provisions, persons subject to the various product efficiency standards of Part 430 promulgated under DOE's rulemaking authority may apply to OHA for exception relief. *See, e.g., Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001); *Midtown Dev., L.L.C.*, OHA Case No. VEE-0073 (2000); *Amana Appliances*, OHA Case No. VEE-0054 (1999). An exception to the revised efficiency standards is warranted only in those limited circumstances where relief is necessary to prevent a special hardship, inequity, or unfair distribution of burdens. 10 C.F.R. § 1003.20; *Reuland Electric Co.*, OHA Case No. EXC-15-0001 (2016).

We note initially that DOE's adoption of the EPS Final Rule is fully consistent with the policy objectives of the EPCA. The revised standard provides consumers with the benefits of improved, more efficient technology. In doing so, the revised standard will not only save money for consumers, but will also conserve significant amounts of energy for the nation as a whole. DOE estimates that the "lifetime savings for EPSs purchased in the 30-year period that begins in the year of compliance with new and amended standards (2015-2044) amount to 0.94 quads. The annual energy savings in 2030 amount to 0.15 percent of total residential energy use in 2012." 79 Fed. Reg. at 7850. In view of the nation's increasing energy needs, the benefits of energy conservation cannot be overstated. In addition, the higher energy efficiency standard will have substantial environmental benefits by contributing to the overall reduction of greenhouse gas emissions. *Id*. DOE expected that under the new standards, EPS manufacturers may lose up to

18.7% of their industry net present value, but did not expect any plant closings or significant loss of employment from the impact on manufacturers. 79 Fed. Reg. at 7849.

As stated in our prior decisions, the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. *See, e.g., Fluke Corp.*, OHA Case No. EXC-16-0006 (2016) (*Fluke)*; *Tektronix, Inc.*, OHA Case No. EXC-16-0007 (2016); *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012) (citing *Viking Range Corp.*, OHA Case No. VEE-0075 (2000)); *SpacePak/Unico Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004). These factors include the economic impact on the manufacturers and consumers, net consumer savings, energy savings, impact on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(i), 42 U.S.C. § 6295(o)(2)(B)(i). With this in mind, we have carefully reviewed Avocent's Application for Exception and have determined that the firm's request for exception should be denied as it has not demonstrated that it would suffer "special hardship, inequity, or unfair distribution of burdens." *See* 42 U.S.C. § 7194(a).

Avocent has failed to demonstrate that the firm would suffer a gross inequity in the absence of exception relief. In prior proceedings, we have held that a manufacturer of a covered product will suffer a gross inequity if its compliance with the applicable DOE efficiency standard will result in a substantial detrimental impact not intended by the regulation or authorizing legislation. *See, e.g., Electrolux Home Products*, OHA Case No. TEE-0012 (2004); *Maytag Corp.*, OHA Case No. TEE-0022 (2005). The major considerations cited by Avocent in its Application, *i.e.*, that it needs additional time to come into compliance due to requirements for re-designing and re-testing the EPSs, or that the costs for coming into compliance are too high, are shared by all manufacturers who had to come into compliance with respect to their EPSs. Avocent has not demonstrated that it has suffered a disproportionate impact from the EPS Final Rule over other EPS manufacturers. While Avocent claims that the EPSs used with its products are "high-end devices customized for use only with their assorted products," Avocent has still not shown that it is in such a unique position, different from other EPS manufacturers, that it would suffer a gross inequity without exception relief. It has not provided adequate information supporting its contention that it can only use highly specialized EPSs for its products.

While in previous decisions we granted temporary exception relief for a period of two years, the manufacturers in those cases would have faced an unfair competitive disadvantage for not having the same relief as other manufacturers in the same industry. *See Feit Electric Company, Inc.*, OHA Case No. EXC-13-0001 (2013). We have also granted exception relief when timely compliance could not be met for reasons beyond the control of the manufacturers, such as volatility of the market, uncertainty regarding prices stemming primarily from production and export limitations imposed by foreign countries, and the inability of manufacturers to consistently obtain sufficient quantities of a material needed to meet standards pertaining to specific products. *See Philips Lighting Co., et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. Critical to OHA's analysis in those cases was not only the losses of these sales revenues, but also residual losses across their product lines as a result of being unable to offer a full slate of products as offered by competitors. *See Ushio America, Inc.*, OHA Case No. EXC-12-0004; *Halco Lighting Technologies*, OHA Case No. EXC-12-0005 (2012); *Satco Products, Inc.*, OHA Case No. EXC12-0009 (2012). Here, the situation is demonstrably different. Avocent has not shown that it would

suffer an unfair competitive disadvantage compared to other firms in the same industry if we did not grant it exception relief or that there were circumstances beyond its control to warrant the additional time to come into compliance. While Avocent has contended that it has not been able to obtain compliant EPSs from its suppliers XXXXXX and XXXXXXXXX, it has not provided any evidence of its efforts to do so, even when requested by OHA. Moreover, Avocent has not contended or shown that it has attempted to find alternate suppliers to provide compliant EPSs.[4] Accordingly, Avocent has not shown anything similar to the reasons we have deemed sufficient in the past for showing gross inequity or an unfair distribution of burdens to warrant exception relief. Thus, we cannot grant Avocent exception relief on this basis as well.

Finally, Avocent has not demonstrated that denial of relief will result in the significant losses of revenues resulting from compliance with the EPS Final Rule that would place a special hardship upon the firm. Avocent contends that for 2016, the projected revenue, during the six-month period for which it seeks exception relief, from the affected end-use products using the seven EPSs for which it seeks exception relief is XXXXXXXXX or XX of its estimated total sales of $XXXXXXXXX for 2016. Avocent's Response to the RFI at 6-7. Based upon the relatively low percentage of Avocent's gross revenues that will be attributable to covered products, Avocent will not suffer an unfair economic burden or significant loss of revenue from a denial of this Application. *See Fluke* (finding that a loss of 10 percent expected sales would not impose a special hardship or inequity)*; W.W. Grainger, Inc.*, OHA Case No. EXC-13-0003 (2013). An exception applicant has the burden of showing that it will suffer a special hardship, inequity, or unfair distribution of burdens in the absence of relief. Avocent has failed to do this for the reasons discussed above. Therefore, its Application for Exception will be denied.

B. Exemption Relief

Avocent alternatively requests a 120-day grace period to comply with the new efficiency standards, citing a DOE Guidance that was issued in December 2010, entitled Consumer/Commercial Distinction Under EPCA, concerning compliance standards for refrigerators. *See* www1.eere.energy.gov/buildings/appliance_standards/pdfs/cce_faq.pdf (December 2010 Guidance). Avocent claims that since the EPS Final Rule cited the December 2010 Guidance, it should be allowed a 120-day grace period to come into compliance with the EPS Final Rule. The December 2010 Guidance provides that if a manufacturer mistakenly believed a particular model was not a covered consumer product because it has only (or principally) been distributed to commercial or industrial consumers, the DOE will allow a 120-day grace period "beginning December 2, 2010, before requiring that these basic models be certified as meeting the applicable energy conservation standard for the relevant consumer product." *Id.* That guidance was issued when the period for compliance of refrigerators began under a separate Rule. Here, Avocent had at least two years before the compliance date of the EPS Final Rule to know whether its products were covered, in view of information in the December 2010 Guidance document.

Furthermore, the reference to the December 2010 Guidance in the EPS Final Rule was to clarify the scope of the Rule, not to extend the120-day grace period to EPS manufacturers. *See* EPS Final Rule at 7,860. Nonetheless, to the extent that Avocent was unsure whether or not its products were

[4] Nor has Avocent explained why obtaining alternate suppliers for its EPSs would not be feasible.

subject to the EPS Final Rule, it could have looked to the December 2010 Guidance when the EPS Final Rule was issued in February 2014, which stated that the "the fact that a model is marketed and sold only or primarily to commercial/industrial customers *does not* necessarily make it a commercial/industrial product for purposes of applying DOE's energy and water conservation standards," and then lists factors for determining whether the product is "of a type" that makes it a consumer product. December 2010 Guidance. These factors include "whether the model operates in a manner that is significantly different from models of the same product types that are sold for personal use or consumption" and "the extent to which the product type can be used in a residential application." *See id.* Hence, Avocent had adequate information to determine whether or not the EPSs used with its products would be subject to the EPS Final Rule in February 2014.

For these reasons, we also conclude that Avocent has not met its burden of establishing that it is entitled to exemption relief. In adopting the EPS Final Rule, the DOE clearly contemplated the possibility of increased manufacturing and installation costs, yet it concluded that additional costs were justified in achieving the desired energy savings. Moreover, the discussion concerning the EPS Final Rule indicates that "Congress did not grant DOE with the general authority to exempt any already covered product from the requirements set by Congress." 79 Fed. Reg. at 7862. Thus, if we were to grant Avocent exemption relief, particularly for the reasons articulated by Avocent, we would be undermining the energy efficiency goals of the EPCA and of Congress. Accordingly, we are also denying Avocent's Application for Exemption.

It Is Therefore Ordered That:

(1) The Application for Exception from DOE Energy Conservation Standards for External Power Supplies filed by Avocent Corporation on February 9, 2016, is hereby denied.

(2) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act. 42 U.S.C. 7194, may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 5, 2016